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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-485

GEORGE I. NORMAN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY BRIEF OF PETITIONER

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The government thinks it sufficient to support the judgment below to argue that Norman aided and abetted his co-defendant bank directors to "exploit their positions to obtain benefits which were concealed from the bank" (Br. in Opp. 11) (footnote omitted). That is enough, the government submits, to sustain a conviction under 18 U.S.C. § 656. A violation of that statute occurs, the government says, "when a bank officer causes a loan to be made for his own benefit and conceals his interest in the loan from the bank" (*id.* 10). For this proposition the government relies upon the Second

Circuit's decision in *United States* v. *Fortunato*, 402 F.2d 79 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969) —as did the courts below at the prosecution's urging. Yet the Second Circuit, in its recent decision rendered after *Fortunato* and the judgment below, has squarely ruled (through Chief Judge Friendly) that enabling bank officers to exploit their positions to obtain benefits concealed from the bank—the charge against Norman as now defined by the government—does *not* aid and abet a violation of the statute. *United States* v. *Docherty*, —— F.2d —— No. 72-1299, decided October 31, 1972.*

The government says it "do[es] not read the Second Circuit's recent decision . . . *Docherty* . . . as having altered this standard [for § 656]" (Br. in Opp. 10, n. 17). But Judge Lumbard, dissenting in *Docherty*, reads that decision as accomplishing precisely such an alteration, by abandoning the *Fortunato* precedent (Supp. Pet. 13a).

The government's efforts to distinguish *Docherty* on the facts are similarly meritless. First, it says, Norman "actively facilitated the misrepresentation which enabled him and the Coopers to obtain the bank funds" (Br. in Opp. 12, n. 19). This can refer only to the fact that Norman drew down the loans through nominees rather than by himself—an action which the government now concedes is "financially sound and acceptable" (Br. in Opp. 10), and which, by itself, has never been the basis of a criminal charge under § 656. The fact is that, putting to one side Norman's use of nominees, the government's evidence shows that he did noth-

* The *Docherty* decision was the subject of a supplement to Norman's petition, filed November 30, 1972.

ing other than what Docherty did—he surely engaged in no misrepresentation as to the purpose of any loan, nor did he aid and abet in any such misrepresentation. Docherty, to the contrary, knew full well that the loans he was drawing down from the bank were not for his "personal" use, although he so stated; and he knew something that no one has ever suggested Norman could have known or did know—that the bank officer arranging the loans was disabled by bank rules from taking them.

Second, the government retreats to its charge that Norman's "intricate disbursement of the loan proceeds certainly supported the inference that he knew of the Coopers' efforts to deceive the bank, and intended to facilitate that effort by concealing the source of the funds" (*id.*). The charge of "intricate disbursement" merely confirms Norman's contention that the jury was permitted to find guilt on the basis of complexity in his business dealings. Moreover, there is nothing in that disbursement, "intricate" or otherwise, that casts any light on the state of Norman's knowledge as to the Coopers' alleged efforts to deceive the bank, or Norman's supposed intent to facilitate those efforts. Surely, no inference may be drawn from the disbursement that comes close to the *direct* evidence in *Docherty* that the defendant knew the bank officer with whom he was dealing, and on whose behalf he was drawing down bank loans, was disabled by bank rules from receiving those funds.

Finally, the government relies on the fact "that the bank ultimately suffered a substantial loss on this loan [referring to one of the two transactions], as a result of the manipulations of petitioners. This evidence was

sufficient on the question of Norman's intent to injure or defraud to permit submission of the various counts to the jury" (*id.*). But the evidence of "manipulations" on which the government now relies to show Norman's intent was ruled inadmissible as to Norman by the trial judge.*

The government now advises counsel for Norman that it will not seek this Court's review of the *Docherty* decision. The government thus acquiesces in an important, narrowing interpretation of a major criminal statute by one of the country's most eminent and respected jurists. But, confronted with a case on all fours with the one it has just accepted, the government refuses to extend relief to the petitioner whose position cannot be meaningfully distinguished from that of an identically situated defendant. In each case, a man has gone to trial charged with assisting a bank officer to borrow money from his bank without the bank's knowledge. In one case, the court has found an offense under the statute; in the other, not. The uniform administration of federal criminal justice demands that the question whether such activity is an offense under the law not

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* The reason for the trial court's ruling was sound—the loss occurred one and a half years after Norman's contact with the transaction. The trial court properly and repeatedly ruled that because of the remoteness of intervening occurrences and the absence of any connective link to Norman, such evidence could not be used against him. The court expressly excluded the testimony of a government witness as against Norman on this score (Tr. 519)—a ruling corroborated days later (Tr. 1214). And it excluded as against Norman the documentary exhibits upon which the government based this allegation (Tr. 655, 1214). As the court put it, "[O]nce the funds are taken from the bank and you can show the disposition of those funds, why then the case is closed as far as those particular individuals involved are concerned" (Tr. 649).

turn on the fortuity of the judicial circuit in which a defendant goes to trial. Given the government's acquiescence in *Docherty*, and its failure to confess error herein, the petitioner Norman can look only to this Court for relief in correcting this manifest incongruity, and only this Court can resolve the conflict between the Circuits.

For the foregoing reasons, the petitioner, George I. Norman, Jr., respectfully submits that the Second Circuit's decision in *Docherty* compels reversal of the judgment below, as do the failure of proof of an offense under the statute and the prejudice resulting from denial of a severance. The petitioner submits that the Court should grant the petition to resolve the conflict between the Second and Tenth Circuits.

Respectfully submitted,

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